Nos. 20378, 20447 and 20522

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD,
ET AL.,

Appellants,

vs.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(NOW CENTRAL DISTRICT OF CALIFORNIA)

BRIEF FOR INTERVENOR N. JOSEPH ROSS

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I N D E X

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EQUITABLE SAVINGS & LOAN ASSOCIATION, ET AL.,
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Preliminary Statement

Intervenor N. Joseph Ross (hereinafter "Ross") one of the shareholder members of Long Beach Federal Savings and Loan Association (hereinafter "Long Beach") was permitted to intervene in the trial court and participated in the proceedings culminating in the summary judgment to which the present appeal is directed. (See Order Permitting Intervention of N. Joseph Ross filed January 29, 1964, Transcript 506)

It is the position of Intervenor Ross that the judgment herein appealed from should be affirmed.

Intervenor Ross does not believe it necessary or appropriate to respond to all of the assertions made by appellants, as these matters will no doubt be covered by the briefs to be filed by the various appellees.

We believe it may be helpful, however, to focus attention on a few aspects of the case which warrant particular emphasis.

ARGUMENT

I THE RIGHT TO PRO RATA DISTRIBUTION ANTEDATED THE MERGER AGREEMENT AND COULD NOT BE DESTROYED BY THAT ARGUMENT.

The right to pro rata distribution among the shareholder members of Long Beach is founded, inter alia, on the Charter of Long Beach, the Settlement Agreement and the mutual nature of an Association such as Long Beach under Federal law.

A. The Charter

The Charter of Long Beach, and particularly Section 9 thereof, provides in part:

> "...All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts in the event of voluntary or involuntary liquidation, dissolution or winding up the association." (Emphasis added.)

We do not believe the Federal Home Loan Bank Board (hereinafter "Bank Board") has the power to abrogate that provision.

Nor would the existence of such power in the Bank Board be consistent with the rights of Intervenor and other shareholder members of Long Beach, including their constitutional rights of due process and equal protection and to be secure against the impairment of contractual obligations.

Treigle v. Acme Homestead Association,
297 U.S. 189 (1936),
Huntington v. National Savings Bank,
96 U.S. 388 (1878),
Hamilton National Bank v. District of Columbia,
156 F. 2d 843, 846 (C.A. Dist. of Col., 1946),
Intermountain Building & Loan Ass'n. v. Gallegos,
78 F. 2d 972 (C.A. 9, 1935).

In Hamilton National Bank v. District of Columbia, supra, the court, in holding that a difference in treatment by the taxing authorities of National Banks and State Banks was an illegal discrimination, observes (156 F.2d 846):

> "...The matter before us is the validity of an administrative action, and the scope of the power of classification by an administrator under a statute is obviously much less broad

than is the power of the Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which 'operates to create a rule out of harmony with the statute, is a mere nullity.' We do not think that an administrative officer can restrict a statutory term such as 'incorporated savings bank' by a definition having no relation to savings deposits or accounts. He cannot eliminate by administrative definition, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition. His attempt to do so is invalid as not in harmony with the statute."

Likewise, in the instant case the Bank Board may not eliminate, by administrative action, the

right of shareholders to participate pro rata in the distribution of the Equitable stock. The Board's attempt to do so is invalid as not in harmony with the Charter.

In an attempt to avoid the effect of the Charter provisions, appellants argue that:

1. Section 9 of the Charter does not apply to a "merger", and

2. The provisions of the Charter were superseded by the terms of the merger.

The former argument is predicated on what we believe to be a strained and unnatural reading of the Charter.

As for the suggestion that the merger agreement supersedes the Charter, we do not believe that the fundamental rights of the Long Beach members could thus be abrogated by mere fiat. It must be remembered that the right to pro rata distribution is not a mere ancillary

right but one which goes to the very heart of the Charter.

In relying upon the provisions of the Merger Agreement which were inserted at the instance of the Bank Board, appellants are in effect attempting to lift themselves by their own bootstraps. The fact is that the provisions of the Merger Agreement in question were and are a nullity and were properly stricken when challenged in the very proceedings contemplated by the Merger Agreement itself.

B. The Settlement Agreement

The right of pro rata distribution is reinforced by Article XV (h) of the Settlement Agreement, which provides as follows:

"XV(h) - After the assumption by Equitable of said aggregate principal amount of all Long Beach share accounts and after the payment or the making by Long Beach of provision for payment of all creditor and other liabilities, the net surplus, reserves and undivided profits of Long Beach shall be distributed as andwhen available to Long Beach shareholders of record at the close of business of the date (herein called 'Approval day') on which such plan shall be approved by the members of Long Beach as follows:

"(i) - Each such shareholder shall be entitled to such part of the amount of such distribution as the dollar value

in principal of his share account at the close of business on Approval Day bears to the total dollar value in principal of all Long Beach share accounts at the same time (not including said adjusting dividends in the computation). Each such shareholder shall be given written notice of his proportionate share as soon as practicable after Approval Day.

"(ii) - Such distribution shall be made from time to time, as directed by the Long Beach Directors subject to the next following sub-paragraphs (iii), (iv), (v), and (vi), until the total net surplus, reserves and undivided profits and any other remaining assets of Long Beach have been collected, converted into cash, and distributed according to such plan."

Appellants' belabored effort to avoid the effect of the Settlement Agreement reflects a

rather surprising position on the part of those who are claiming to act in the interests of "fairness".

C. Basic Federal Policy

The attempt of the Bank Board to prevent pro rata distribution not only flies in the face of the Charter and the Settlement Agreement, but also overlooks the basic policy embodied in the Federal statutes--a policy which appears to be overlooked by appellants.

Thus, 12 USC, Section 1464 (a) provides:

> "(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Emphasis added.)

The foregoing statutory provision points up the essential mutual nature of an Association such as Long Beach. In such a mutual Association preferences may not be given one depositor or shareholder over another.

Section 1464 also recognizes the sanctity of the Long Beach Charter which provides for pro rata distribution.

II APPELLANTS' NOTIONS OF "FAIRNESS"ARE IRRELEVANT HERE.

Appellants' argument as to the alleged "fairness" of the forfeiture provisons in the merger agreement presupposes that the Bank Board would have authority to insert such provisions if it found them "fair". But while we do not concede that the forfeiture provisions are in any way fair or equitable, we submit that this question of "fairness" is beside the point here because appellants' arguments in that regard are based on a false premise.

Actually, there was no authority whatever in the Bank Board to require a forfeiture of the pro rata rights of the shareholder members of Long Beach regardless of the Board's notions of "fairness".

III THE SHAREHOLDER MEMBERS OF LONG BEACH WERE NOT NOTIFIED OF ANY CONTEMPLATED FORFEITURE AT THE TIME OF THEIR DEPOSITS; THE ATTEMPTED FORFEITURE IS THEREFORE VIOLATIVE OF DUE PROCESS.

There is one aspect of the case which appellants appear to treat in a somewhat cavalier fashion, namely, the fact that the shareholder members of Long Beach were never notified at the time they made their deposits that they might be divested of their rights to a pro rata share in the proceeds of the Association merely because they pledged their stock or by reason of the size of their accounts.

On the contrary, the mutual nature of the Association, the provisions of the Charter and the Settlement Agreement all constituted assurance that each depositor would receive his pro rata share.

We respectfully submit that neither the Bank Board nor any other party could subsequently insert provisions in the Merger Agreement or elsewhere which would preclude such depositors from receiving their pro rata share. Such action would plainly deprive them of the benefits of due process of law.

CONCLUSION:

The Summary Judgment from which the present appeal was taken is grounded on a thoroughly considered memorandum of the trial court and amply supported by considerations of precedent, logic and sound policy.

Therefore Intervenor Ross respectfully urges that the Judgment below be affirmed.

Respectfully submitted,

PACHT, ROSS, WARNE, BERNHARD & SEARS

By /s/ Harvey M. Grossman
HARVEY M. GROSSMAN
Attorneys for Intervenor
N. Joseph Ross

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Harvey M. Grossman
HARVEY M. GROSSMAN